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Holding the "Responsible Corporate Officer" Responsible: Addressing the Need For Expansion of Criminal Liability For Corporate Environmental Violators

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COMMENT

HOLDING THE "RESPONSIBLE CORPORATE OFFICER" RESPONSIBLE: ADDRESSING THE NEED FOR EXPANSION OF CRIMINAL LIABILITY FOR CORPORATE ENVIRONMENTAL VIOLATORS

I. INTRODUCTION

As custodians of the planet, we are bound by a duty to protect the environment for all living creatures. Ensuring ecosystems function harmoniously is of utmost importance in order to sustain the health of the Earth and all living organisms residing on and in its fertile soils and rich waters. Since the expansion of business during the Industrial Revolution, companies of all sizes have been impacting our environment, leaving cumulative footprints of destruction in their paths.[1] This impact has been devastating, and without proper regulation this trend will continue with dire consequences.[2]

[1] *See* Encyclopædia Britanica Online, Industrial Revolution, www.britannica.com/EBchecked/topic/287086/Industrial-Revolution (last visited Jan. 21, 2010). The Industrial Revolution began in Europe in the eighteenth century, and was characterized by "unprecedented economic development" and a "general expansion of commercial activity." *Id.*; *see also* N. Brian Winchester, *Emerging Global Environmental Governance*, 16 Ind. J. Global Legal Stud. 7, 8 (2009) ("The Industrial Revolution was similarly characterized by contaminated water, poisonous air, and deadly epidemics that were undoubtedly responsible for the premature death of thousands of people.").

[2] *See*, *e.g.*, *Species Disappearing at an Alarming Rate, Report Says*, MSNBC.COM, Nov. 17, 2004, www.msnbc.msn.com/id/6502368/ (reporting that the "world's biodiversity is declining at an unprecedented rate . . . [with] [h]abitat destruction and degradation [being] the leading threats."); *see also* U.S. EPA, Climate Change – Greenhouse Gas Emissions, www.epa.gov/climatechange/

Criminal prosecution of environmental crimes has played a key role in enforcing compulsory regulations that govern the corporate private sector.[3] Criminal sanctions in the corporate arena are essential to deter and remediate environmental crimes and ensure protection of the public.[4] Imposing civil liability on a corporation is insufficient, as the true violators may hide behind the corporation and avoid personal liability.[5] Through litigation, a doctrine has been developed that is used to expand criminal liability beyond the corporation to include "responsible corporate officers."[6] Subsequently, this doctrine has been written into various environmental statutes,[7] but application of this doctrine has been met with varying resistance because of its ability to "pierce the corporate veil."[8] Over time the courts narrowed the scope of this doctrine.[9]

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emissions/co2.html (last visited Jan. 31, 2010) "Since the Industrial Revolution in the 1700's, human activities, such as the burning of oil, coal and gas, and deforestation, have increased CO2 concentrations in the atmosphere. In 2005, global atmospheric concentrations of CO2 were 35% higher than they were before the Industrial Revolution.").

[3] *See* Eva M. Fromm, *Commanding Respect: Criminal Sanctions for Environmental Crimes*, 21 ST. MARY'S L.J. 821, 822 (1990) ("[Government] agencies now feel that the mere imposition of fines is largely ineffective; thus resulting in the onset of criminal sanctions. The threat of possible incarceration for violations of environmental statutes has terrorized many environmental managers and commanded their previously unattainable respect.").

[4] *See* Kathleen F. Brickey, *Environmental Crime at the Crossroads: The Intersection of Environmental and Criminal Law Theory*, 71 TUL. L. REV. 487, 506 (1996-97) (noting that criminalization of environmental violations is rooted in the core concepts of criminal law, including deterrence, harm, and culpability); *see also* Ethan H. Jessup, *Environmental Crimes and Corporate Liability: The Evolution of the Prosecution of "Green" Crimes by Corporate Entities,* 33 NEW ENG. L. REV. 721, 730 (1999) ("One of the main purposes and policies behind any criminal prosecution is deterring criminals and would-be criminals from committing crimes.").

[5] *See* BLACK'S LAW DICTIONARY, corporate veil (8th ed. 2004) ("The legal assumption that the acts of a corporation are not the actions of its shareholders, so that the shareholders are exempt from liability for the corporation's actions.").

[6] United States v. Dotterweich, 320 U.S. 277 (1943); United States v. Park, 421 U.S. 658 (1975); *see also* Randy J. Sutton, Annotation, *"Responsible Corporate Officer" Doctrine or "Responsible Relationship" of Corporate Officer to Corporate Violation of Law* , 119 A.L.R. 5th 205 (2004) (discussing case application of the responsible corporate officer doctrine, or on the basis of a determination that there was a "responsible relationship" of a corporate officer to a corporate violation of law, or a "responsible share" in such a violation, as derived from the doctrine first enunciated in Dotterweich, and later in Park).

[7] *See* 33 U.S.C.A. § 1319(c)(6)(Westlaw 2010) ("For the purpose of this subsection, the term 'person' means, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer."); 42 U.S.C.A. § 7413(c)(6)(Westlaw 2010) ("For the purpose of this subsection, the term 'person' includes, in addition to the entities referred to in section 7602(e) of this title, any responsible corporate officer.").

[8] *See, e.g.*, Assaf Hamdani, *Mens Rea and the Cost of Ignorance*, 93 VA. L. REV. 415, 446 (2007). ("[The *Dotterweich* and *Park*] decisions are credited with introducing the so-called 'responsible corporate officer' ('RCO') doctrine, which continues to generate substantial confusion and uncertainty concerning the extent to which corporate officers are strictly liable for corporate misconduct."); Jeremy D. Heep, *Adapting the Responsible Corporate Officer Doctrine in Light of*

Congress specifically added "responsible corporate officers" to the list of those criminally liable under the Clean Water Act (CWA)[10] and the Clean Air Act (CAA).[11] This comment argues that the responsible corporate officer (RCO) doctrine, as written into the CWA and the CAA, was intended to impose an affirmative duty on corporate officers based on their position and should be interpreted to expand criminal liability in the prosecution of substantive corporate environmental crimes.

This comment also argues that the courts should expand criminal liability based on the RCO doctrine instead of limiting its application. Part II provides an overview of criminal prosecution of environmental crimes: its history, procedures, and purposes, in order to provide a context for understanding how the RCO doctrine appropriately expands criminal liability. Part III outlines the development of the RCO doctrine by the Supreme Court and its addition to the CWA and the CAA. Although the RCO doctrine has been expanded to impose civil liability, this comment focuses on its application to impose criminal liability only. Part IV shows how some of the early judicial applications of the RCO doctrine left it open for later courts to use the doctrine to expand criminal liability of corporate officers. The clearest example of this argument for expansion was articulated by the Tenth Circuit in *United States v. Brittain.*[12] At the same time as *Brittain*, other circuits chose to limit liability instead of expanding it; these contemporaneous decisions are discussed in Part V. Part VI shows how subsequent courts chose to affirm the limited interpretation rather than *Brittain's* expanded one. Lastly, Part VII examines other legal doctrines that extend criminal liability. This comment concludes by arguing that the effectiveness of environmental laws would be maximized by the application of the RCO doctrine to expand criminal liability.

United States v. MacDonald & Watson Waste Oil Co., 78 MINN. L. REV. 699, 700 (1994) (noting that "the scope and breadth of the [responsible corporate officer] doctrine remains ambiguous").

[9] *See, e.g.,* United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35 (1st Cir. 1991) (finding that proof that the defendant was a responsible corporate officer was insufficient to show required knowledge for conviction under RCRA); United States v. White, 766 F. Supp. 873 (E.D. Wash. 1991) (rejecting the proposition that a corporate officer may be held criminally liable for RCRA violations based solely on the officer's responsible position.); United States v. Iverson, 162 F.3d 1015 (9th Cir. 1998) (finding that the doctrine relieves the government *only* of having to prove that defendant *personally* discharged or caused the discharge of a pollutant; the government still had to prove that the discharges violated the law and that defendant knew that the discharges were pollutants).

[10] *See* 33 U.S.C.A.§ 1319(c)(6) (Westlaw 2010).

[11] *See* 42 U.S.C.A. § 7413(c)(6) (Westlaw 2010).

[12] United States v. Brittain, 931 F.2d 1413 (10th Cir. 1991).

II. CRIMINAL PROSECUTION OF ENVIRONMENTAL CRIMES

There are two broad categories of offenses that can result in criminal prosecution of environmental crimes. The first category is covered under Title 18 of the United States Code, which punishes conspiracies, the making of false statements, mail and wire fraud, and other similar crimes.[13] These types of crimes are outside the scope of this comment. The second category involves acts made punishable specifically under the various environmental statutes enacted since 1970 such as the CWA and the CAA,[14] which will be the focus of this comment.

A. HISTORY OF CRIMINAL PROSECUTION OF ENVIRONMENTAL CRIMES

Federal environmental laws that incorporate criminal sanctions can be traced back over one hundred years to the Rivers and Harbors Act (RHA) of 1899.[15] The RHA formed the basis for the CWA, which was designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[16] Under the CWA, violators were originally subject mostly to civil and administrative penalties.[17] However, during the 1980's the federal government increased the penalties to include criminal enforcement.[18] To support this increase, the Department of Justice's (DOJ) Lands Division was reorganized to form the Environmental Enforcement Section.[19] The publicly stated goal of this reorganization was to focus on "egregious violations" and "deliberate or recalcitrant violations" to enhance criminal enforcement of environmental crimes.[20] In January 1981 the Environmental Protection Agency (EPA) created the Office of Criminal Enforcement to aid in this enforcement.[21]

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[13] 18 U.S.C.A. § 2 (Westlaw 2010).

[14] *See* DANIEL RIESEL, ENVIRONMENTAL ENFORCEMENT: CIVIL AND CRIMINAL, § 6.02 (2008).

[15] Ch. 425, 30 Stat. 1121 (1899) (codified as amended in 33 U.S.C.A. § 401, et seq. (Westlaw 2010)).

[16] 33 U.S.C.A. § 1251(a) (Westlaw 2010).

[17] *See* Susan Hedman, *Expressive Functions of Criminal Sanctions in Environmental Law*, 59 GEO. WASH. L. REV. 889, 893-94 (1991).

[18] *See id.* at 894 (discussing the increase in penalties from civil to include criminal as a reflection of society's changing opinion as to the violation of environmental regulations).

[19] *See* Judson W. Starr, *Turbulent Times at Justice and EPA: The Origins of Environmental Criminal Prosecutions and the Work that Remains*, 59 GEO. WASH. L. REV. 900, 904 (1990).

[20] *See id.* at 904 (discussing DOJ's attempt to shift to a new enforcement approach).

[21] *See id.* at 907.

In November 1982 the DOJ established the Environmental Crimes Unit (ECU) to manage the criminal cases being filed by the EPA.[22] "The creation of ECU served to provide DOJ with a team of prosecutors who could concentrate exclusively on environmental criminal cases while informing the public of DOJ's commitment to criminal prosecution of environmental crimes."[23] The ECU was very successful, filing forty cases in the first year and achieving forty convictions.[24]

During this time period, Congress was increasing the complexity of the regulatory regime and raising many violations from misdemeanors to felonies.[25] This increased enforcement was especially necessary in the corporate arena. The theory was, and still is, that without criminal sanctions that can include heavy fines and the occasional imprisonment of corporate officers, corporations would continue to treat environmental violations as a "cost of doing business."[26]

B. PROSECUTION OF ENVIRONMENTAL CRIMES

The criminal enforcement of environmental crimes begins at the EPA and flows through to the DOJ.[27] Administrators at the EPA are authorized to respond to violations through administrative or civil sanctions.[28] In order to obtain criminal sanctions they must refer the case

[22] *See* JUDSON W. STARR & YVETTE D. WILLIAMS, ENVIRONMENTAL CRIMES IN PERSPECTIVE, A.L.I.-A.B.A. CONTINUING LEGAL EDUCATION 1, 5 (Nov. 8-9, 2001).

[23] *Id.*

[24] *See* Memorandum from Peggy Hutchins, paralegal, to Ronald A. Sarachan, then-Environmental Crimes Section Chief, Department of Justice (Apr. 7, 1995), reproduced in JOHN F. COONEY ET AL., ENVIRONMENTAL LAW INSTITUTE, ENVIRONMENTAL CRIMES DESKBOOK 87 (1996), *available at* http://books.google.com/books?id=-fWD7LptUiwC&lpg=PP1&dq=environmental%20crimes%20deskbook&pg=PP1#v=onepage&q=&f=false; *see also* Starr & Williams, *supra* note 22, at 5.

[25] *See* Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2446-47 (1995) (discussing how Congress significantly enhanced the penalties applicable to existing environmental criminal provisions, upgrading many violations from misdemeanors to felonies).

[26] *See* David B. Spence, *The Shadow of the Rational Polluter: Rethinking the Role of Rational Actor Models in Environmental Law*, 89 CAL. L. REV. 917, 922 (2001) (discussing the idea that if polluters are rational, the availability of criminal penalties is crucial to deterrence because sometimes the economic benefit of noncompliance will exceed the maximum allowable civil penalty under the statute); *see also* Paul Thomson, *A New Cost of Business for Environmental Violators*, ENVTL. FORUM, May-June 1990, at 32 ("Jail time is one cost of doing business that cannot be passed along to the consumer."); *see also* E. Dennis Muchnicki, *Only Criminal Sanctions Can Ensure Public Safety*, ENVTL. FORUM, May-June 1990, at 31 (arguing that "fines become merely a cost of doing business," and that only the threat of jail can deter some environmental crime).

[27] *See* Peter Krug, *Prosecutorial Discretion and its Limits*, 50 AM. J. COMP. L. 643, 659 (2002).

[28] *See id.*

to the DOJ.[29] At the DOJ, the prosecutors have discretion in deciding whether to file charges for a violation and what sanctions should be sought.[30] Further, both EPA and DOJ can exercise their discretion not to file charges for violations altogether.[31] This includes discretion to decide "(1) which crimes to prosecute and against which groups or individuals; (2) when to investigate; (3) whether to charge; (4) whether to divert the potential defendant from the criminal system to civil proceedings; and (5) whether to plea bargain or dismiss charges."[32]

Critics of environmental prosecutions feel that prosecutorial discretion creates problems with the fairness and predictability of environmental criminal enforcement.[33] One commentator argued that prosecutorial discretion "often results in an "eeny meeny miny mo" element of prosecutorial choice in the environmental crimes arena and imposes an almost arbitrary randomness and the appearance of unfairness."[34] The concern is that prosecutorial discretion could be used as a means of "widening the net" of criminal- enforcement efforts beyond that intended by congressional statutes.[35] But, like other branches of statutory law, much of federal criminal law is flawed by imperfect draftsmanship.[36] This creates the need for flexibility, which is exactly what prosecutorial discretion does to ensure appropriate enforcement decisions. In fact, it is a necessary method for screening cases and limiting the number of cases that are actually prosecuted to those that actually deserve to be.[37]

[29] 42 U.S.C.A. § 7413(a)(3)(D) (Westlaw 2010).

[30] *See* Krug, *supra* note 27, at 645.

[31] *See* JOHN F. COONEY ET AL., ENVIRONMENTAL LAW INSTITUTE, ENVIRONMENTAL CRIMES DESKBOOK 8 (1996), *available at* http://books.google.com/books?id=-fWD7LptUiwC&lpg=PP1&dq=environmental%20crimes%20deskbook&pg=PP1#v=onepage&q=&f=false.

[32] Theodora Galacatos, *The United States Department of Justice Environmental Crimes Section: A Case Study of Inter- and Intrabranch Conflict over Congressional Oversight and the Exercise of Prosecutorial Discretion*, 64 FORDHAM L. REV. 587, 599 (1995).

[33] *See* Kathleen F. Brickey, *The Rhetoric of Environmental Crime: Culpability, Discretion, and Structural Reform*, 84 IOWA L. REV. 115, 116 (1998).

[34] Milo C. Mason & Paul B. Smyth, *Reviewing Nonreviewable Prosecutorial Discretion: What and Who is Behind the Big, Powerful Curtain,* 23 NAT. RESOURCES & ENV'T 7, 31-32 (2009).

[35] Brickey, *supra* note 33, at 129.

[36] Robert L. Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STAN. L. REV., 1036, 1073 (1972) (criminal statutes tend to be written at "a level of generality that would make literal enforcement unjust").

[37] *See* Brickey, *supra* note 33, at 129.

C. PURPOSES OF THE CRIMINAL ENFORCEMENT OF ENVIRONMENTAL LAWS

Criminal prosecution of environmental crimes is the appropriate response to environmental violations, especially in the corporate context. Criminal prosecution offers a wide range of advantages that traditional civil sanctions do not, such as deterrence, remediation, and increased public safety.[38] Deterrence is essential to the effectiveness of environmental enforcement because many of the effects of environmental crimes are irreversible.[39] Criminal prosecution is also fitting for environmental violations because the remediation process offered by criminal sanctions is more effective in its timeliness.[40] Further, for reasons of public safety, criminal prosecution is a necessary response to environmental crimes due to the potential for widespread harm.[41]

i. Deterrence

One of the main purposes of criminal prosecution is to deter potential violators from committing crimes. In fact, criminal sanctions are considered the most effective means of deterrence available because of the power criminal courts have to impose severe penalties, such as jail time.[42] Because of the potential for businesses to write off the civil penalties imposed for violations of environmental regulations as a cost of doing business, the use of criminal sanctions for violations of environmental laws reflects society's unwillingness to tolerate environmental mistreatment. It also reflects society's desire to make sure that businesses do not just pass on the civil costs of violations to the consuming public.[43] In addition to preventing businesses from taking this view, the threat of criminal sanctions creates a strong personal incentive for corporate officers to comply with the law to avoid criminal

[38] *See* Jessup, *supra* note 4, at 730.

[39] *See* Brickey, *supra* note 4, at 507 (discussing common traits of environmental crime and traditional crime, noting that "[e]nvironmental crimes have the potential to cause catastrophic harm to the environment, public health, and local economies and ways of life").

[40] *See* Jessup, *supra* note 4, at 731.

[41] *See id.* ("[A]ny threat or potential threat to that safety are reasons for prosecuting environmental crimes.").

[42] *See* Brickey, *supra* note 4, at 506 (describing the "social group" that corporate officials belong to as being susceptible to coercion based on the threat of jail time due to the stigma that it carries).

[43] *See* Jessup, *supra* note 4, at 730; *see also* Martin E. Levin, *The Massachusetts Environmental Strike Force*, in 5 THE BEST OF MCLE 47, 51 (1994).

punishments.[44] Normally corporate officers and employees are shielded from personal liability by the corporate entity.[45] Therefore, criminal sanctions are an effective means of deterrence because in criminal law, corporate officers are not protected from liability.[46]

ii. Remediation

Environmental crimes can create problems that require expedited remediation in order to limit the extent of the harm.[47] Criminal prosecutions often move more quickly than civil and administrative actions and are therefore a more effective means of remediation.[48] This is important in situations where a quick response to environmental crimes is needed, whether it is clean-up or the prevention of future violations. Another important aspect of remediation is society's need for vindication through the punishment of a violator.[49] Criminal prosecution of environmental crimes is necessary to reflect the seriousness of the offense, to promote respect for environmental laws, and to provide just punishment for the offense.[50]

iii. Public Safety

Protection of the public follows along the same lines as deterrence and remediation. Criminal sanctions, such as incarceration, are critical in protecting the public from further crimes of the defendant.[51] With the

[44] *See* Brickey, *supra* note 4, at 506; *see also* Martin E. Levin, *The Massachusetts Environmental Strike Force*, in 5 THE BEST OF MCLE 47, 51 (1994) ("Imposition of personal criminal liability on corporate officers and employees . . . is seen as one way of ensuring that businesses will take their environmental obligations seriously.").

[45] *See* BLACK'S LAW DICTIONARY, corporate veil (8th ed. 2004) ("The legal assumption that the acts of a corporation are not the actions of its shareholders, so that the shareholders are exempt from liability for the corporation's actions"); *see also* 18 AM. JUR. 2D *Corporations* § 48 (2009).

[46] *See* Brickey, *supra* note 4, at 506.

[47] *See* Jessup, *supra* note 4, at 731 ("The need to expedite remediation of an environmental problem is an important consideration, as the protection of human health and the environment is a central goal of criminal environmental enforcement."); *see also* Levin, *supra* note 44, at 51.

[48] *See* Jessup, *supra* note 4, at 731 ("The 'criminal justice system frequently moves more quickly than civil litigation or even administrative action.'") (quoting Martin E. Levin, *The Massachusetts Environmental Strike Force*, in 5 THE BEST OF MCLE 47, 51 (1994)).

[49] *See* Jessup, *supra* note 4, at 730-31 ("[W]here the environmental violation results in such harm to an individual, the public or the environment that society demands punishment, the case likely will be prosecuted criminally.") (quoting Martin E. Levin, *The Massachusetts Environmental Strike Force*, in 5 THE BEST OF MCLE 47, 51 (1994)).

[50] 18 U.S.C.A. § 3553(a)(2)(A) (Westlaw 2010) (listing seriousness of the offense, respect for environmental laws, and just punishment as factors to be considered in imposing a sentence).

[51] 18 U.S.C.A. § 3553(a)(2)(C) (Westlaw 2010) (listing the need to protect public from

public's heath and safety as a central concern for many public agencies, any threat to safety creates a strong incentive for prosecuting environmental crimes.[52] "Where . . . conduct . . . has been particularly egregious or repetitive, showing a total disregard for public health and safety, it may be necessary to impose incarceration . . . simply to protect the public."[53]

III. THE RESPONSIBLE CORPORATE OFFICER (RCO) DOCTRINE

The RCO doctrine has been discussed in United States Supreme Court cases as well as written into multiple environmental-law statutes.

A. UNITED STATES SUPREME COURT CASES

The RCO doctrine was originally articulated by the United States Supreme Court in *United States v. Dotterweich* in 1943.[54] The RCO doctrine was revisited and affirmed by the United States Supreme Court in *United States v. Park* in 1975.[55] The RCO doctrine was also addressed in *United States v. International Minerals & Chemical Corp.* a few years prior to *United States v. Park*.[56]

i. United States v. Dotterweich

The RCO doctrine is considered to have originated in *United States v. Dotterweich.*[57] Dotterweich, the president of Buffalo Pharmacal, Inc., was convicted for adulterated or misbranded food under the Federal Food, Drug, and Cosmetic Act (FDCA) when the company purchased, repacked under its own label (misbranded), and shipped drugs in interstate commerce, which is a violation of 21 U.S.C.A. § 331(a).[58] At the same time that Dotterweich was found guilty, the company of which Dotterweich was the president was found not guilty.[59] The FDCA prohibited "the introduction or delivery for introduction into interstate

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further violations as a factor to be considered in imposing a sentence).

[52] *See* Jessup, *supra* note 4, at 731.

[53] Jessup, *supra* note 4, at 731 (quoting Martin E. Levin, *The Massachusetts Environmental Strike Force*, in 5 THE BEST OF MCLE 47, 51 (1994)).

[54] *See* United States v. Dotterweich, 320 U.S. 277 (1943).

[55] *See* United States v. Park, 421 U.S. 658 (1975).

[56] *See* United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558 (1971).

[57] 320 U.S. 277 (1943).

[58] *Id.* at 278.

[59] *Id.*

commerce of any . . . drug . . . that is adulterated or misbranded."[60] Further, the Act provided that "any person" violating this provision was guilty of a misdemeanor.[61] Dotterweich appealed the conviction by claiming that since the company had already been charged, he could not also be charged for the same crime.[62] The Supreme Court held that "[t]he offense is committed, unless the enterprise which they are serving enjoys the immunity of a guaranty, by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws . . . ."[63] This reasoning created the original foundation for the RCO doctrine, which alleviated the need to prove independent criminal liability of a corporate officer. Under the reasoning of the RCO doctrine, a corporate officer could now share criminal liability based upon his or her position in the corporation, and his or her ability to prevent violations of the law.[64]

The Supreme Court justified holding an RCO liable for the crime of the corporation.[65] The Court stated, "Congress has preferred to place [criminal liability] upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless."[66] The Supreme Court's reasoning in *Dotterweich* follows the rationale of imposing criminal liability on RCOs based on their positions.

ii. United States v. Park

Almost thirty years after *Dotterweich*, the Supreme Court decided *United States v. Park*[67] and reaffirmed the Court's decision to apply criminal liability to RCOs. In *Park*, the Court quoted *Dotterweich*,

[60] 21 U.S.C.A. § 331(a) (Westlaw 2010).

[61] *See* 21 U.S.C.A. § 333(a).

[62] *Dotterweich*, 320 U.S. at 281 (stating that, "individuals are immune when the 'person' who violates s 301(a) is a corporation . . . .").

[63] *Id.* at 284; *see also* Cynthia H. Finn, *The Responsible Corporate Officer, Criminal Liability, and Mens Rea: Limitations on the RCO Doctrine*, 46 AM. U. L. REV. 543, 551 (1996).

[64] *Dotterweich*, 320 U.S. at 285 (refusing to define what class of employees would stand in responsible relation or who had a responsible share, but rather leaving it to the "good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries").

[65] *See id.* at 281 (stating that "in the interest of the larger good, it puts the burden of acting at hazard upon a person otherwise innocent, but standing in responsible relation to a public danger"); *see also* Karen M. Hansen, *"Knowing" Environmental Crimes*, 16 WM. MITCHELL L. REV. 987, 998-99 (1990).

[66] *Dotterweich*, 320 U.S. at 285; *see also* Finn, *supra* note 63, at 551.

[67] United States v. Park, 421 U.S. 658 (1975).

saying: "[t]he [Federal Food, Drug and Cosmetic] Act is of a now familiar type which dispenses with the conventional requirement for criminal conduct—, awareness of some wrongdoing."[68] The Court went on to say that "the Act imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur."[69] The Supreme Court validated the FDCA's decision to extend the imposition of liability to corporate officers. In fact, the Court further stated that "the requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises . . . ."[70] The Supreme Court stands behind the imposition of criminal liability based on a corporate officer's position.

Unfortunately, the policy of holding corporate officers criminally liable based on their position was created and affirmed by the Supreme Court in cases involving violations of the FDCA,[71] which contains no mens rea[72] requirement.[73] Therefore, *Dotterweich* and *Park* dealt with violations that would be considered strict liability crimes.[74] The courts have been hesitant to extend criminal liability in the context of statutes with a mens rea element because the original application of the RCO doctrine did not require proving mens rea.[75] This has led to uncertainty and mixed results as to the use of RCO liability to secure a conviction in later court decisions.

iii. United States v. International Minerals & Chemical Corp.

The Supreme Court opened the door for an expanded use of the RCO doctrine in *United States v. International Minerals & Chemical Corp.*[76] In a government appeal of a dismissed information charging the

[68] *Id.* at 668 (quoting United States v. Dotterweich, 320 U.S. 277 (1943)) (internal quotation marks omitted).

[69] *Id.* at 672; *see also* Hansen, *supra* note 65, at 1000.

[70] *Park*, 421 U.S. at 672.

[71] *See* United States v. Dotterweich, 320 U.S. 277 (1943); *see also Park*, 421 U.S. 658.

[72] *See* BLACK'S LAW DICTIONARY, mens rea (8th ed. 2004) ("The state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime; criminal intent or recklessness.").

[73] *See* 21 U.S.C.A. § 333 (Westlaw 2010); *see also* Finn, *supra* note 63, at 551.

[74] *See Park*, 421 U.S. 658 (1975); *Dotterweich*, 320 U.S. 277 (1943).

[75] See Parts V and VI below, discussing how later courts refused to extend liability without proof of actual knowledge in environmental crimes that have a mens rea requirement.

[76] United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558 (1971).

defendant with violating ICC regulations, the Supreme Court determined the word "knowingly" applied only to knowledge of the facts, not knowledge of the applicable regulation or a violation of the regulation.[77] In this case, the defendant was charged with shipping sulfuric and hydrofluosilicic acids in interstate commerce and knowingly failing to indicate on the requisite papers that they were corrosive liquids, in violation of regulations.[78] The Court opined that when dangerous products are involved, "the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation."[79] The Court justified its holding reasoning by referencing the principle of criminal law that, "ignorance of the law is no excuse."[80] The Supreme Court thus reiterated its conclusion that it is proper to impose criminal liability upon those in a responsible position to ensure compliance with the law.

B. STATUTORY HISTORY

The CAA and the CWA both include language holding "responsible corporate officers" individually liable.[81] This comment argues that this addition to the Acts reflects a congressional intent to impose criminal liability on those persons who hold responsible positions in corporate violations.

i. The CAA

In 1955, Congress enacted the Air Pollution Control Act as the first federal statute dealing with air quality and air pollution, providing funds for research.[82] The Clean Air Act of 1970 was the first federal legislation regarding air pollution control, authorizing the development of comprehensive federal and state regulations limiting emissions.[83] Later amendments increased regulation; under Section 113(c) of the 1977 CAA, the EPA administrator was authorized to bring actions resulting in

[77] *See id.* at 563-64; *see also*, Hansen, *supra* note 65, at 1008.

[78] *Int'l Minerals,* 402 U.S. at 559.

[79] *Id.* at 565.

[80] *Id.*; *see also* Barbara DiTata, *Proof of Knowledge Under RCRA and Use of the Responsible Corporate Officer Doctrine,* 7 FORDHAM ENVTL. L.J. 795, 805 (1996) (describing the theory of *Int'l Minerals* as imposing a "presumption of awareness of regulation").

[81] *See* 42 U.S.C.A. § 7413(c)(6)(Westlaw 2010); *see* 33 U.S.C.A. § 1319(c)(6)(Westlaw 2010).

[82] United States Environmental Protection Agency, History of the Clean Air Act (2008), www.epa.gov/air/caa/caa_history.html.

[83] *Id.*

either fines, confinement, or both, when specific sections of the CAA were knowingly violated.[84] Thus, under the 1977 CAA, criminal liability could be imposed under subsection 113(c)(1) for just having knowledge of the violations.[85] The 1990 CAA Amendments increased the criminal-enforcement options of environmental laws. The criminal-enforcement provisions of the amended CAA are still contained in Section 113(c), which now mandates a fine, or imprisonment for up to five years, or both.[86] Under subsection (c)(1) criminal liability may be imposed for knowing violations of CAA regulations.[87] Furthermore, under Section 113(c)(2) of the CAA, criminal liability with a fine and a maximum two-year prison sentence may be imposed for (1) knowingly making any false statement, representation, or certification in a document filed or required to be maintained under the CAA; (2) falsifying, tampering with, or knowingly rendering inaccurate any monitoring device or method required to be maintained; or (3) knowingly failing to make reports that are required.[88] Also, the fines and prison sentences can be doubled in the event of a second conviction of any of these offenses.[89]

ii. The CWA

Two years after enacting the CAA in 1970, Congress amended the Federal Water Pollution Control Act, commonly called the Clean Water Act.[90] The CWA of 1972 provided misdemeanor penalties of up to one year of imprisonment and a $25,000 fine for the willful or negligent violation of requirements imposed by or under the CWA,[91] or of the conditions or limitations in a National Pollutant Discharge Elimination System (NPDES) permit issued by the EPA Administrator or, a state, or in a Section 404 permit.[92] The same violation was made a felony if committed after a first conviction.[93] The 1972 statute also established misdemeanor penalties of up to six months of imprisonment and a $10,000 fine for knowingly falsifying records and for tampering with

[84] 42 U.S.C.A §§ 7413(c)(1)(1977) amended by 42 U.S.C.A. § 7413 (1990); *see also* Adamo Wrecking Co. v. United States, 434 U.S. 282 (1978).

[85] 42 U.S.C.A. § 7413(c)(1).

[86] 42 U.S.C.A. § 7413(c)(1) (person convicted of violation "shall, upon conviction, be punished by a fine pursuant to Title 18, or by imprisonment for not to exceed 5 years, or both").

[87] 42 U.S.C.A. § 7413(c)(1).

[88] 42 U.S.C.A. § 7413(c)(2).

[89] 42 U.S.C.A. § 7413(c)(1),(2).

[90] 33 U.S.C.A. § 1319 (Westlaw 2010).

[91] 33 U.S.C.A. § 1319(c)(1).

[92] 33 U.S.C.A. § 1319(c)(1)(B).

[93] 33 U.S.C.A. § 1319(c)(1).

monitoring devices required to be maintained under the CWA.[94]

The CWA was amended in 1987, increasing criminal penalty provisions.[95] A violator may now be liable for misdemeanor penalties of up to one year of imprisonment and a $25,000-per-day fine for the negligent violation of any of eight specific sections of the statute,[96] of requirements imposed by permits issued under the Section 402 NPDES program, or of the Section 404 dredge-and-fill permit program, or for the contamination of sewer systems and publicly owned treatment works.[97] Further, the amendments distinguished between negligent violations, which are punished as misdemeanors, and knowing violations, which are punished as felonies.[98] These increased penalty provisions are essential to the enforcement capabilities of the EPA.

iii. Statutory Inclusion of the RCO Doctrine

The 1990 Amendments to the CAA also added the "responsible corporate officer" provision to the definition of "person" for purposes of criminal penalties.[99] This provision is similar to the CWA addition in the 1977 Amendments.[100] With the 1977 enactment and in the 1990 Amendments to the CAA, Congress failed to explain the addition of the RCO provisions.[101] The only legislative reference concerning the addition of the RCO provision in the 1977 amendment to the CAA is made in a report from the Senate Committee on Environment and Public Works, which states as follows:

> For the purpose of liability for criminal penalties the term "person" is defined to include any responsible corporate officer. This is based on a similar definition in the enforcement section of the Federal Water Pollution Control Act. The Committee intends that criminal penalties be sought against those corporate officers under whose responsibility a violation has taken place, and not just those employees directly

[94] 33 U.S.C.A. § 1319(c)(2).

[95] *See* 33 U.S.C.A. § 1319(c)(1972) amended by 33 U.S.C.A § 1319(1987).

[96] 33 U.S.C.A. § 1319(c)(1).

[97] 33 U.S.C.A. § 1319(c)(1)(B).

[98] 33 U.S.C.A. § 1319(c).

[99] 42 U.S.C.A. § 7413(c)(6) (Westlaw 2010).

[100] *See* 33 U.S.C.A. § 1319.

[101] *See* United States v. Brittain, 931 F.2d 1413, 1419 (10th Cir. 1991) ("Section 1319(c)(3) does not define a 'responsible corporate officer' and the legislative history is silent regarding Congress's intention in adding the term. However, the Supreme Court first recognized the concept of 'responsible corporate officer' in 1943.").

involved in the operation of the violating source.[102]

The change intended by these amendments is unclear. Long before the addition of the RCO provisions by these amendments, the Supreme Court held that a corporate official was in fact a "person" subject to liability under the FDCA.[103] With this in mind, the legislative amendments to include RCOs in the definition of "person" would not have been necessary to convict corporate officers, indicating Congress intended a more significant change when adding "responsible corporate officers" as potentially liable parties under the CWA and CAA.[104]

The CWA and CAA require the government to show that a defendant had "knowledge" of the violation to satisfy the mens rea of the felony.[105] However, the RCO doctrine has been used to impose criminal liability without regard to the state of mind of the defendant.[106] The Tenth Circuit addressed this discrepancy in the mental state required for conviction under the CWA:

> We interpret the addition of "responsible corporate officers" as an expansion of liability under the Act rather than, as defendant would have it, an implicit limitation. The plain language of the statute, after all, states that "responsible corporate officers" are liable "*in addition to* the definition [of persons] contained in section 1362(5) . . . ."[107]

The logical interpretation of the addition of the RCO provisions to these statutes would indicate that by incorporating the doctrine into the CWA and CAA, Congress intended to expand criminal liability.[108] This

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[102] Brenda S. Hustis & John Y. Gotanda, *The Responsible Corporate Officer: Designated Felon or Legal Fiction?*, 25 LOY. U. CHI. L.J. 169, 183-84 (1994) (quoting S. Rep. No. 94-717, 95th Cong., 2d Sess. 40 (1976)).

[103] *See* United States v. Dotterweich, 320 U.S. 277, 284 (1943).

[104] Hustis & Gotanda, *supra* note 102, at 183-84; *see also*, Joseph J. Lisa, *Negligence-Based Environmental Crimes: Failing To Exercise Due Care Can Be Criminal*, 18 VILL. ENVTL. L.J. 1, 9 (2007) (arguing that the RCO doctrine imposes criminal sanctions against corporate officers regardless of their participation in violating a public-welfare statute as long as they are in a position of power to prevent or correct the violation and failed to do so).

[105] *See* 33 U.S.C.A. § 1319(c)(2) (Westlaw 2010) (allowing for imprisonment for greater than one year for knowing violations); & 42 U.S.C.A. § 7413(c)(1) (Westlaw 2010) (same); *see also* 18 U.S.C.A. 3559(a) (Westlaw 2010) (distinguishing a misdemeanor from felony by the term of imprisonment for a felony as one year or greater).

[106] *See* Hustis & Gotanda, *supra* note 102, 183; *see also* United States v. Brittain, 931 F.2d 1413, 1419 (10th Cir. 1991).

[107] *Brittain*, 931 F.2d at 1419 (quoting 33 U.S.C.A. § 1319(c)(3)).

[108] *See, e.g.*, United States v. Iverson, 162 F.3d 1015, 1023 (9th Cir. 1998) (applying the plain meaning of "responsible" as "answerable" or "involving a degree of accountability," because the CWA does not include a definition of "responsible corporate officer").

supports the inference that Congress intended to hold corporate officers liable who were in a "responsible position" and allow for the imputation of knowledge to be based on their "responsible position."

The RCO doctrine has also been frequently criticized for its potential effect on any required mens rea element. There is a fear that utilizing the doctrine will hold corporate officials, as a class of defendants, strictly criminally liable and that this will have an unfair and discriminatory effect.[109] This criticism fails to acknowledge that the application of the RCO doctrine does not eliminate the need to prove culpability altogether. Rather, it is a tool by which the appropriate mens rea can be imputed based on other circumstances.[110] Liability is not imposed under the RCO doctrine based solely on the officer's title; rather, an evaluation must be done of the officer's responsibility in relation to the criminal violation.[111]

IV. EARLY CASE APPLICATION OF THE RCO DOCTRINE

A. *UNITED STATES V. FREZZO BROS.*

The first reported case to apply the RCO doctrine to a major federal environmental statute was the Third Circuit's 1979 decision in *United States v. Frezzo Bros.*[112] The defendants, Guido and James Frezzo, owned and operated a mushroom- farming business, Frezzo Brothers, Inc., that was caught discharging pollutants in water of the United States without a permit, in violation of the CWA.[113] The indictment specifically stated that the Frezzos were being charged as individuals in their capacities as co-owners and corporate officers of Frezzo Brothers, Inc.[114] The Frezzos argued on appeal that the district court erred by not instructing the jury that the Frezzos were being charged in their capacity as corporate owners and officers.[115] The court of appeals dismissed this

[109] Finn, *supra* note 63, at 573.

[110] *See* Joseph E. Cole, *Environmental Criminal Liability: What Federal Officials Know (or Should Know) Can Hurt Them,* 54 A.F. L. REV. 1, 35 (2004) ("[I]n no application of the RCO doctrine to an environmental statute has the requirement for proving *mens rea* been done away with; the requirement for knowledge of the underlying acts is still required and can be inferred as a result of the corporate officer's position and authority.").

[111] *See* United States v. Ming Hong, 242 F.3d 528, 531 (4th Cir. 2001).

[112] United States v. Frezzo Bros., 602 F.2d 1123 (3d Cir. 1979).

[113] *Id.* at 1125.

[114] United States v. Frezzo Bros., 461 F. Supp 266, 272 (E.D. Pa. 1978), *aff'd*, 602 F.2d 1123 (3d Cir. 1979).

[115] *Frezzo Bros*., 602 F.2d at 1130 n.11.

argument summarily, noting that "[t]he Government argued the case on the 'responsible corporate officer doctrine' recognized by the United States Supreme Court in *United States v. Park* and *United States v. Dotterweich*," and that the Court "perceive[d] no error in the instruction to the jury on this theory."[116] This Third Circuit decision supports the application of the RCO doctrine to the CWA as it is was applied to the FDCA in *Park* and *Dotterweich*.

However, the issue on appeal was not how the criminal liability of corporate officers had been defined at trial.[117] The defendants contended that it was improper for the trial court to instruct the jury that they could be found guilty as individuals when the government had argued the case on the RCO doctrine and the indictment had charged them with acting as corporate officials.[118] The appellate court found no error in the instruction to the jury on the "responsible corporate officer doctrine" as recognized by the United States Supreme Court in *United States v. Park*[119] and *United States v. Dotterweich*[120] as argued by the Government. Because this was not the issue on appeal the Court's language regarding the correctness of the application of the RCO doctrine was dictum.

B. *UNITED STATES V. JOHNSON & TOWERS, INC.*

In 1984 the Third Circuit decided *United States v. Johnson & Towers, Inc.*,[121] which involved the criminal prosecution of a foreman and a mid-level manager for a "knowing" violation of Resource Conservation and Recovery Act (RCRA) permitting requirements.[122] The EPA had neither issued a permit nor received an application for a permit for Johnson & Towers' operations.[123] However, neither defendant was actually in a position to secure the permit for the company on his own authority.[124]

In discussing who may be found guilty under RCRA, the court first reiterated the principle expressed in *Dotterweich* that "though the result may appear harsh, it is well established that criminal penalties attached to

[116] *Id.*
[117] *Id.* at 1124.
[118] *Id.* at 1130 n.11.
[119] United States v. Park, 421 U.S. 658 (1974).
[120] United States v. Dotterweich, 320 U.S. 277 (1943).
[121] United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. 1984).
[122] *Id*. at 663-64.
[123] *Id.* at 664.
[124] *See id.* at 666.

regulatory statutes intended to protect public health, in contrast to statutes based on common-law crimes, are to be construed to effectuate the regulatory purpose."[125] The court's decision supports the imposition of harsh criminal liability based on the officer's position, justifying the results on the importance of public safety.

The court addressed the fact that *Dotterweich* involved a strict liability statute[126] and that *Johnson & Towers, Inc.* dealt with a statute containing a scienter requirement.[127] The Court suggested that, because of the public-welfare nature of RCRA, there might be a "reasonable basis for reading the statute without any mens rea requirement."[128] But the court also held that, because of the explicit knowledge requirement and the syntax of the statute,[129] the government would have to prove that the defendants knew that Johnson & Towers, Inc., was required to have a permit, and also knew that Johnson & Towers, Inc., did not have the permit.[130]

The CWA and the CAA differ from RCRA in that they actually have RCO liability written into them. This opinion appears to restrict the imposition of criminal liability because the statute requires knowledge. It is arguable that this opinion is not applicable to violations of the CAA or CWA because this court was dealing with RCRA, which does not have the RCO doctrine written into it.[131] Further, the court indicated that a reasonable basis existed for imposing crminal liability solely on the basis of a corporate officer's position, but that it could not in this case due to the wording of the statute.[132]

V. CONTEMPORANEOUS COURT OPINIONS

There were three different cases decided in 1991 involving the RCO doctrine. *United States v. Brittain*[133] spoke to the expansion of criminal liability under the RCO doctrine. On the other hand, both *United States v. MacDonald & Watson Waste Oil Co.*[134] and *United States v. White*[135]

[125] *Id.*
[126] *See* 21 U.S.C.A. §§ 301-392 (Westlaw 2010).
[127] *See* 42 U.S.C.A. § 6928(d) (Westlaw 2010).
[128] *Johnson & Towers*, 741 F.2d at 668.
[129] *See id*.
[130] *Id.* at 670.
[131] *See* 42 U.S.C.A. § 6928 (Westlaw 2010).
[132] *See Johnson & Towers*, 741 F.2d at 668.
[133] United States v. Brittain, 931 F.2d 1413 (10th Cir. 1991).
[134] United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35 (1st Cir. 1991).
[135] United States v. White, 766 F. Supp. 873 (E.D. Wash. 1991).

went in the opposite direction, placing a limitation on the application of the doctrine.

A. *UNITED STATES V. BRITTAIN*

In *United States v. Brittain*,[136] the defendant was charged with two misdemeanor counts under the CWA for unlawful discharges into navigable waters.[137] The CWA expressly includes RCOs in its definition of persons who can be convicted under the Act.[138] Brittain was the public utilities director for the city of Enid, Oklahoma, and "had general supervisory authority over the operation of the [city's] wastewater treatment plant."[139] The evidence showed that Brittain was advised that pollutants were being discharged into a local creek in violation of the city's permit.[140] Brittain had observed the discharges but instructed the plant supervisor not to report them to the EPA, even though it was required by the permit.[141]

Brittain raised a statutory-construction argument on appeal that addressed the CWA's definition of the terms "individual" and "responsible corporate officer."[142] Brittain contended that there was no evidence that he individually caused the unlawful discharge, and the only proof of his involvement with the discharge was his relationship to the discharging entity, Enid.[143] Therefore, he argued, he could not be convicted as an "individual" under the Act. Brittain argued that for criminal liability to attach to an individual who is related to the discharging entity but is not the actual discharger, the government must establish that the individual was an RCO.[144]

The court rejected this argument, holding that the inclusion of the term "responsible corporate officer" in the CWA did not narrow the range of individuals subject to criminal liability.[145] The court discussed the origin of the term in *Dotterweich* and *Park*, likening the purposes of the CWA to that of the FDCA and explaining that "Congress perceived

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[136] 931 F.2d 1413.

[137] *Id.* at 1414 (10th Cir. 1991) (Brittain was also charged with making false statements under 18 U.S.C.A. § 1001 (1988)); *see also* 33 U.S.C.A. § 1319 (Westlaw 2010).

[138] 33 U.S.C.A. § 1319(c)(6) (Westlaw 2010) (definition of "person").

[139] *Brittain*, 931 F.2d at 1415.

[140] *Id.* at 1418.

[141] *See id.* at 1420.

[142] *See id.* at 1419.

[143] *See id.* at 1420.

[144] *See id.* at 1419.

[145] *Id.*

the public health interest to outweigh the hardship suffered by criminally liable responsible corporate officers who had no consciousness of wrong-doing."[146] Concluding that the same public health rationale applies to the CWA, the court went on to state:

> We think that Congress perceived this objective [to restore and maintain the integrity of the nation's waters] to outweigh hardships suffered by "responsible corporate officers" who are held criminally liable in spite of their lack of "consciousness of wrong-doing." We interpret the addition of "responsible corporate officers" as an expansion of liability under the Act. . . Under this interpretation a "responsible corporate officer," to be held criminally liable, would not have to "willfully or negligently" cause a permit violation. Instead, the willfulness or negligence of the actor would be imputed to him by virtue of his position of responsibility.[147]

Unfortunately, the defendant's criminal intent was not an issue on appeal.[148] For this reason, the court's language regarding imposing criminal liability on RCOs has been dismissed as dictum.[149] Nevertheless, it does indicate how the court would decide the issue if it were to come before it.

B. *UNITED STATES V. MACDONALD & WATSON*

The First Circuit chose to limit criminal liability in *United States v. MacDonald & Watson Waste Oil Co.*[150] The First Circuit overturned the felony conviction of the company president, ruling that the trial court's jury instructions improperly suggested that the president could be convicted of a knowing RCRA violation based upon his position as an RCO and without actual proof of actual knowledge.[151] The jury had been instructed that knowledge could be proven either by a showing of actual knowledge or by a showing that the defendant was an RCO.[152] The trial court stated that a defendant is an RCO if the defendant (1) was a corporate officer, (2) had the responsibility to supervise the allegedly illegal activities, and (3) knew or believed that illegal activity of the type

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[146] *Id.*

[147] *Id.*

[148] *See id.* at 1413.

[149] *See* Finn, *supra* note 63, at 565-66 ("On close analysis, it is clear that the Tenth Circuit's "expansive language in Brittain" is "unwarranted dicta.").

[150] United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35 (1st Cir. 1991).

[151] *Id.* at 50-51.

[152] *Id*.

alleged occurred.[153]

The First Circuit ruled that this test was inconsistent with the express mens rea requirement in RCRA.[154] The First Circuit agreed that knowledge may be inferred from willful blindness or circumstantial evidence, including a defendant's position, responsibility, conduct, and information provided to the defendant on prior occasions.[155] However, the court held that it was improper to allow a conclusive presumption of knowledge based on such evidence when the crime expressly requires proof of knowledge as an element.[156] Accordingly, the court concluded that "[i]n a crime having knowledge as an express element, a mere showing of official responsibility under *Dotterweich* and *Park* is not an adequate substitute for direct or circumstantial proof of knowledge."[157]

Again it should be noted that the CWA and the CAA differ from RCRA in that they actually have RCO liability written into them. It is arguable that this opinion is inapplicable to CAA or CWA violations because this court was dealing with RCRA, which does not have the RCO doctrine written into it.[158]

C. *UNITED STATES V. WHITE*

The same limitation is further supported under RCRA violations by the decision in *United States v. White*,[159] in which the United States District Court for the Eastern District of Washington clearly rejected the proposition that a corporate officer may be held criminally liable for RCRA violations based solely on the officer's responsible position.[160] In *White*, the prosecution relied on *Park* and *Dotterweich* to argue that the company's environmental safety officer could be held liable for knowing criminal violations of RCRA simply by virtue of his position of responsibility and authority.[161] The court disagreed, holding that those cases were inapplicable because they involved strict-liability crimes, whereas the criminal provision of RCRA contains a mens rea element of knowledge.[162] The RCO doctrine, the court ruled, does not apply to

[153] *Id.* at 50, 52 n.15.
[154] *Id.* at 53.
[155] *Id.* at 52, 54.
[156] *Id.* at 52.
[157] *Id.* at 55.
[158] *See* 42 U.S.C.A. § 6928 (Westlaw 2010).
[159] United States v. White, 766 F. Supp. 873 (E.D. Wash. 1991).
[160] *See id.* at 895.
[161] *Id.* at 894.
[162] *Id.* at 894-95.

crimes where the applicable statute requires proof of knowledge as an element of the crime.[163] The court concluded that to secure a conviction, the government must prove that the defendant had actual knowledge of the violations, rather than merely showing that the defendant should have known of the violations.[164]

VI. CONFIRMATIONS OF RCO-DOCTRINE LIMITATIONS

Although the limitations set forth on the RCO doctrine set forth in *United States v. MacDonald & Watson Waste Oil Co.*[165] and *United States v. White*[166] were in the context of RCRA, the reasoning was extended to apply under the CWA and the CAA in later cases.

A. *UNITED STATES V. IVERSON*

In *United States v. Iverson*,[167] the Ninth Circuit affirmed a limited application of the RCO doctrine to Thomas Iverson, the president of a company who both encouraged and allowed his employees to discharge water containing chemical residue into the sewer.[168] The district court's jury instruction on the RCO doctrine required that to convict, the jury had to find that (1) the defendant had knowledge of the fact that pollutants were being discharged to the sewer system by employees of the company, (2) the defendant had the authority and capacity to prevent the discharge of pollutants to the sewer system, and (3) the defendant failed to prevent the on-going discharge of pollutants into the sewer system.[169] On appeal, Iverson argued that these instructions erroneously allowed the jury to find him guilty of CWA violations without finding that he was actually in control of the activity that caused the discharge, or that he had an express corporate duty to oversee the activity, and without finding that the discharges violated the CWA.[170] The Ninth Circuit rejected these arguments and upheld the use of the RCO doctrine.[171]

[163] *Id.* at 895.

[164] *Id.*

[165] United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35 (1st Cir. 1991).

[166] United States v. White, 766 F. Supp. 873 (E.D. Wash. 1991).

[167] United States v. Iverson, 162 F.3d 1015 (9th Cir. 1998).

[168] *Id.* at 1018-19.

[169] *Id*. at 1022.

[170] *Id.* (holding that a "responsible corporate officer" did not have to participate or control her employees' actions to be held liable, but that liability hinged only on "authority to exercise control" over the activity in question). *But see* U.S. v. Bestfoods, 524 U.S. 51, 70-72 (1998) (holding that an "operator" must participate in and control its subsidiaries' activities to be liable).

[171] *See Iverson*, 162 F.3d at 1026.

However, the court noted that the doctrine "relieve[s] the government *only* of having to prove that defendant *personally* discharged or caused the discharge of a pollutant. The government still had to prove that the discharges violated the law and that defendant knew that the discharges were pollutants."[172] This affirms the limitations that were set forth in *United States v. MacDonald & Watson Waste Oil Co.*[173] and *United States v. White.*[174] The courts chose to restrict criminal liability by requiring actual knowledge in the CWA context instead of allowing for the use of the RCO doctrine to close the gap between the reality of corporate officers' knowledge of the violation and the difficulty in proving that knowledge.

B. *UNITED STATES V. MING HONG*

United States v. Ming Hong[175] was a CWA prosecution for permit violations. James Ming Hong was the owner of Avion Environmental Groups, a wastewater treatment facility in Richmond, Virginia.[176] Hong was charged with negligently violating pretreatment requirements "as a responsible corporate officer."[177] Hong argued that he could not be prosecuted as a responsible corporate an RCO because he was not a formally designated corporate officer of Avion and, alternatively, that he did not exert sufficient control over Avion's operations to be held responsible for the discharges from Avion's facility.[178] The Fourth Circuit rejected both arguments.[179] It began by reviewing *Dotterweich*, which it summarized as "holding that all who had 'a responsible share' in the criminal conduct could be held accountable for corporate violations of the law."[180] The court also noted that *Park* "elaborat[ed] on the concept of a 'responsible share,'" holding that a defendant may be held criminally responsible for a violation he did not directly commit if "the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so."[181] The

[172] *Id.*
[173] United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35 (1st Cir. 1991).
[174] United States v. White, 766 F. Supp. 873 (E.D. Wash. 1991).
[175] United States v. Ming Hong, 242 F.3d 528 (4th Cir. 2001).
[176] *Id.* at 529-30.
[177] *Id.* at 531.
[178] *Id.*
[179] *Id.* at 529.
[180] *Id.* at 531.
[181] *Id.* (quoting United States v. Park, 421 U.S. 658, 673-74 (1975)); *see also* Lisa, *supra* note

court described the criminal liability to be applied under the RCO doctrine as:

> The gravamen of liability as a responsible corporate officer is not one's corporate title or lack thereof; rather, the pertinent question is whether the defendant bore such a relationship to the corporation that it is appropriate to hold him criminally liable for failing to prevent the charged violations of the CWA.[182]

This reasoning appears to leave the door open to an extension of liability based on corporate position. Unfortunately, this application of the RCO doctrine is limited, because James Ming Hong was held criminally liable under CWA § 309(c)(1)(A) for negligent discharges by his company, not for knowing violations.[183]

C. *UNITED STATES V. HANSEN*

In *United States v. Hansen*,[184] the Eleventh Circuit affirmed the convictions of three individuals convicted of conspiracy and violating the CWA, RCRA, and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The district court used an RCO instruction requiring that, to convict, the jury had to find that the defendants "acted knowingly in failing to prevent, detect or correct the violation."[185] The defendants argued that the instruction allowed the jury to find them guilty based on constructive, rather than actual, knowledge.[186] The Eleventh Circuit rejected this argument, holding that the requirement that the defendants must have "acted knowingly" made it sufficiently clear that the jury could not find the defendants guilty under the RCO doctrine without finding that they had actual knowledge of the violations.[187] This holding again reaffirmed the mens rea limitation set by previous courts.

104, at 9.

[182] *Ming Hong*, 242 F.3d at 531.

[183] *Id.* at 532.

[184] United States v. Hansen, 262 F.3d 1217 (11th Cir. 2001).

[185] *Id.* at 1252.

[186] *Id.*

[187] *Id.* at 1253.

VII. JUSTIFICATION FOR EXPANDING LIABILITY

A. THE NEED FOR THE EXPANSION OF LIABILITY

The RCO doctrine is a necessary tool to close the gap between the reality of corporate officer involvement in the violation of environmental crimes and prosecutors' ability to convict corporate officers for their involvement.[188] A corporation may be convicted for crimes of its agents who violate the law while acting on its behalf and in the scope of their employment,[189] but a corporate officer is generally not criminally liable unless he or she personally participates in or authorizes the criminal act.[190] Generally, an officer cannot be convicted for acts performed by other employees unless it is proven that the actions were done under the officer's direction or with his or her permission.[191] This is what makes the use of the RCO doctrine so important, especially in the prosecution

[188] *See* John Monroe, *Applying the Responsible Corporate Officer and Conscious Avoidance Doctrines in the Context of the Abu Ghraib Prison Scandal*, 91 IOWA L. REV. 1367, 1383 (2006) (arguing that the RCO doctrine and the conscious-avoidance doctrines provide an analytical framework for the prosecution of parties who are not directly involved in a criminal act); *see also* WILLIAM E. KNEPPER & DAN A. BAILEY, LIABILITY OF CORPORATE OFFICERS AND DIRECTORS 255 (6th ed. 1998).

[189] *See* N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 494-95 (1909) (in considering the criminal responsibility of a corporation for an act done while an authorized agent of the company was exercising the authority conferred upon him, the Court found that in applying the principle governing civil liability, "we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises").

[190] *See* 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 29, at 181 (15th ed. 1993) ("In connection with the principal in the second degree or accessory before the fact, the terms 'aid' and 'abet' are frequently used interchangeably, although they are not synonymous. To 'aid' is to assist or help another. To 'abet' means, literally, to bait or excite, as in the case of an animal. In its legal sense, it means to encourage, advise, or instigate the commission of a crime.").

[191] *See* Francis Bowes Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 702-08 (1930) (concluding that courts hold a principal criminally liable for acts that he or she "causes" his or her agent to perform, either by express encouragement or knowing acquiescence); *see also* 3A WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1349 (perm. ed., rev. vol. 1999); *see, e.g.*, United States v. Aarons, 718 F.2d 188, 190-93 (6th Cir. 1983) (rejecting aiding and abetting liability of corporate officer who knew that others were making false statements to a government agency, because the officer did not affirmatively encourage the making of those statements); United States v. Berger, 456 F.2d 1349, 1352 (2d Cir. 1972) (affirming aiding and abetting liability of president and chief executive officer whose "willful affirmative acts" included directing a bookkeeper to remove invoices of a foreign subsidiary as part of a tax-evasion scheme); United States v. Laffal, 83 A.2d 871, 872 (D.C. 1951) (noting that the general rule requires that officers must personally authorize a criminal act to be held liable).

of environmental crimes; it can bridge the gap between the current law and what is needed to hold the appropriate actors responsible for corporate environmental crimes.[192]

It is important to note that the RCO doctrine is a common-law theory of imposing liability that is separate and distinct from piercing the corporate veil or personal liability for direct participation in tortious conduct.[193] Unlike when liability is based on piercing the corporate veil, liability as an RCO does not depend on a finding of that the corporation is inadequately capitalized, that the corporate form is being used to perpetrate a fraud, or that corporate formalities have not been honored.[194] The RCO doctrine requires a finding of three essential elements in order to convict a corporate officer:

> (1) [T]he individual must be in a position of responsibility which allows the person to influence corporate policies or activities; (2) there must be a nexus between the individual's position and the violation in question such that the individual could have influenced the corporate actions which constituted the violations; and (3) the individual's actions or inactions facilitated the violations.[195]

These requirements prevent arbitrary imposition of criminal liability based only on corporate title.[196]

Use of the RCO doctrine to infer knowledge in the context of corporate environmental crimes is necessary to convict those officers who are responsible. It is extraordinarily difficult to prove that a

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[192] *See* Todd W. Grant, *The Responsible Relationship Doctrine of* United States v. Park*: A Tool for Prosecution of Corporate Officers Under Federal and State Environmental Laws*, 11 TEMP. ENVTL. L. & TECH. J. 203, 204 (1992) (discussing the difficulty in obtaining a conviction based on circumstantial evidence when there is only indirect evidence of a corporate officer's guilt from the "bad act" of his or her subordinates who may work far down in the corporation's bureaucratic hierarchy).

[193] *See* Noel Wise, *Personal Liability Promotes Responsible Conduct: Extending the Responsible Corporate Officer Doctrine to Federal Civil Environmental Enforcement Cases,* 21 STAN. ENVTL. L.J. 283, 288 (2002) (noting that the doctrine does not require the government to pierce the corporate veil); *see also* Ventres v. Goodspeed Airport, LLC, 881 A.2d 937, 963-64 (Conn. 2005); BEC Corp. v. Dep't of Envtl. Prot., 775 A.2d 928, 938 (Conn. 2001).

[194] *See, e.g*., Kilduff v. Adams, Inc., 593 A.2d 478, 487-88 (1991) ("[W]e conclude that it was unnecessary to pierce the corporate veil in order to find that the [corporate officers] were personally liable for their misrepresentations."); 3A WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1135 (perm. ed., rev. vol. 2009); 18 AM. JUR. 2D *Corporations* § 54 (2009).

[195] In re Dougherty, 482 N.W.2d 485, 490 (Minn. Ct. App. 1992) (citing United States v. Park, 421 U.S. 658, 674 (1975), and United States v. Dotterwich, 320 U.S. 277 (1943)); *see also* Comm'r Ind. Dep't of Envtl. Mgmt v. RLG, Inc.. 755 N.E.2d 556, 561 (Ind. 2001).

[196] *See* United States v. Park, 421 U.S. 658, 674 (1975).

corporate officer actually authorized the criminal act of a lower-level employee, because authorization of that sort is rarely documented.[197] Higher-up corporate officers in positions of control can easily create the impression that they do not know the details of lower-level employees' illegal activity.[198] In fact, because many statutes explicitly require proof of an affirmative illegal act to secure the conviction an officer, the law actually encourages concealment.[199]

B. INFERRING CRIMINAL KNOWLEDGE WITH THE RCO DOCTRINE

Application of the RCO doctrine to expand criminal liability would be consistent with congressional intent because Congress specifically left the definition of "knowingly" to the courts.[200] By not providing any definition, Congress gave the courts authorization to consider doctrinal interpretations, such as the RCO doctrine, in their analysis.[201] By not defining "knowingly," Congress left the definition open to be interpreted according to modern jurisprudence. For example, the jury instruction regarding the term "knowingly" varies from circuit to circuit. The Fifth Circuit's pattern instruction states that "knowingly . . . means that the act was done voluntarily and intentionally, not because of mistake or accident."[202] Similarly, the Ninth Circuit defines "knowing" in this way:

> An act is done knowingly if the defendant is aware of the act and does not act (or fail to act) through ignorance, mistake or accident. The government is not required to prove that the defendant knew that his/her acts or omissions were unlawful. You may consider the

[197] *See* RONALD R. SIMS & MARGARET P. SPENCER, UNDERSTANDING CORPORATE MISCONDUCT: AN OVERVIEW AND DISCUSSION, IN CORPORATE MISCONDUCT: THE LEGAL, SOCIETAL AND MANAGEMENT ISSUES 1, 11-12 (Ronald R. Sims & Margaret P. Spencer eds., 1995) (noting that senior officers can easily disguise misconduct in a large organization, as in one case in which officers instituted compliance policies in order to conceal their approval of misconduct).

[198] *See, e.g.,* United States v. TIC Inv. Corp., 68 F.3d 1082, 1089 (8th Cir. 1995) (noting that an officer who exercises complete control over corporate operations may avoid confronting the details of illegal toxic waste disposal, making it difficult to impose liability).

[199] *See, e.g*., People v. Byrne, 570 N.E.2d 1066, 1068-69 (N.Y. 1991) (construing N.Y. Penal Law to limit individual liability for corporate criminal acts to defendants who caused to be performed or personally performed illegal conduct).

[200] *See* United States v. Hayes Int'l Corp., 786 F.2d 1499, 1502 (11th Cir. 1986) ("Congress did not provide any guidance, either in the statute or the legislative history, concerning the meaning of 'knowing' in section 6928(d).").

[201] Heep, *supra* note 8 at 723 (arguing that continued application of the RCO doctrine is consistent with congressional intent because Congress specifically left the definition of "knowingly" to the courts).

[202] FEDERAL JURY PRACTICE & INSTRUCTIONS, PATTERN CRIM. JURY INSTR. 1ST CIR. 2.13 (1998).

> evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.[203]

On the other hand, the Sixth Circuit provides no pattern instruction because it has determined that "the meaning of the term 'knowingly' varies depending on the particular statute in which it appears."[204] The Eighth Circuit provides no model instruction, because "in most cases the word 'knowingly' does not need to be defined."[205] The courts would clearly be acting within appropriate boundaries by allowing the "knowledge" requirement to be met inferentially in environmental crimes through the RCO doctrine.

The inference of knowledge has been applied under several different legal doctrines. Knowledge has been found in situations where only circumstantial evidence was provided.[206] This can also be seen in other legal doctrines such as respondeat superior, or vicarious liability, which allows proof of a defendant's criminal knowledge to be substituted by proof of someone else's knowledge.[207] The courts have also imposed liability under the doctrines of willful blindness or conscious avoidance of the truth.[208] This allows for the inference of knowledge based on what the defendant would have known through the exercise of reasonable diligence.[209] Lastly, an argument can be made for the imposition of liability based on an officer's fiduciary duty to his or her company.[210]

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[203] FEDERAL JURY PRACTICE & INSTRUCTIONS , MODEL CRIM. JURY INSTR. 9TH CIR. 5.6 (2003).

[204] FEDERAL JURY PRACTICE & INSTRUCTIONS, PATTERN CRIM. JURY INSTR. 6TH CIR. 2.06 (2008).

[205] FEDERAL JURY PRACTICE & INSTRUCTIONS, MODEL CRIM. JURY INSTR. 8TH CIR. 7.03 (2007) (citing United States v. Smith, 635 F.2d 716, 719-20 (8th Cir. 1980)).

[206] *See, e.g.,* United States v. Hayes Int'l Corp., 786 F.2d 1499, 1504 (11th Cir. 1986) ("[T]he government may prove guilty knowledge with circumstantial evidence.") In the *Hayes* case, the statute at issue established certain procedures that, when not followed, permitted a jury to infer certain wrongdoing. *Id.*

[207] *See* BLACK'S LAW DICTIONARY, respondeat superior (8th ed. 2004) ("The doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency.").

[208] *See* BLACK'S LAW DICTIONARY, willful blindness (8th ed. 2004) ("Deliberate avoidance of knowledge of a crime, esp. by failing to make a reasonable inquiry about suspected wrongdoing despite being aware that it is highly probable. A person acts with willful blindness, for example, by deliberately refusing to look inside an unmarked package after being paid by a known drug dealer to deliver it. Willful blindness creates an inference of knowledge of the crime in question.").

[209] *See* BLACK'S LAW DICTIONARY (8th ed. 2004), willful blindness (8th ed. 2004).

[210] *See, e.g.,* REV. MODEL BUS. CORP. ACT § 8.30 official cmt. (1983) (setting forth the standards of conduct for directors by focusing on the manner in which directors perform their duties).

Based on all these well-settled theories of law, it is not outside the courts' authority to expand liability by use of the RCO doctrine.

i. Circumstantial Proof of Knowledge

The use of circumstantial evidence to prove knowledge is seen in *United States v. Hayes International Corp.*[211] The defendants in this case, a corporation and one of its employees, were charged with knowingly transporting hazardous waste to an unpermitted facility.[212] The government proved, through a series of circumstances, the defendants' knowledge that the facility to which they had shipped certain paint waste was not recycling the waste.[213] The court pointed out that the government presented no direct proof of the employee's knowledge that paint waste was not being recycled, but that it successfully proved such knowledge through the series of circumstances.[214]

Congressional intent to allow the use of circumstantial evidence to impose criminal liability upon persons can be seen in the enforcement provisions of both the CWA and CAA. They both explicitly provide that knowledge may be established by the use of circumstantial evidence.[215] Again, this indicates that the inference of knowledge via circumstantial evidence under the RCO doctrine would not stray from congressional intent.

ii. Other Ways To Prove "Knowledge"

Along the same lines as circumstantial proof of knowledge, other criminal-law doctrines have been used to prove knowledge in environmental jurisprudence.[216] These doctrines allow for proof of actual

[211] United States v. Hayes Int'l Corp., 786 F.2d 1499 (11th Cir. 1986).

[212] *See id.* at 1501.

[213] *See id.* at 1506. The evidence revealed that the employee knew the recycler derived no economic benefit from accepting the paint waste, and that the employee failed to follow internal corporate procedures requiring disposal of wastes lacking resale value only to sites approved by the EPA. Additionally, conversations between the employee and the recycler indicated that the employee knew that the paint wastes were not being recycled. *Id.*

[214] *See id.; see also supra* notes 190-92 and accompanying text.

[215] *See* CWA, 33 U.S.C.A. § 1319(c)(3)(B)(i) (Westlaw 2010) (providing that "in proving the defendant's possession of actual knowledge [under the knowing endangerment provision] circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information"); *see also* CAA, 42 U.S.C.A. § 7413(c)(5)(B) (Westlaw 2010) (noting providing that "in proving a defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to be shielded from relevant information.").

[216] *See, e.g.,* United States v. Bank of New England, N.A., 821 F.2d 844, 847 (1st Cir. 1987)

knowledge to be based on proof of something other than actual knowledge.[217] Respondeat superior, or vicarious liability, is essential in the area of corporate prosecutions because the doctrine allows proof of the defendant's criminal knowledge to be made by proof of someone else's knowledge.[218] At the turn of the century, the Supreme Court extended the respondeat superior doctrine "a step farther" to include its applicability in the criminal context.[219] "The rationale for extending principles of *respondeat superior* to criminal prosecutions is grounded in the belief that a broad standard is needed . . . to combat the organizational roots of white collar crime."[220]

The doctrine of willful blindness, or and conscious avoidance of the truth, has been used to prove criminal knowledge as well.[221] The doctrine is based on the theory that "deliberate ignorance and positive knowledge are equally culpable."[222] The theory encompasses the idea that a person "knows of facts of which he is less than absolutely certain" when that person is aware of a high probability of the existence of such facts.[223] The doctrine allows the trier of fact to infer guilty knowledge, such as in *United States v. Hayes International Corp.*,[224] where the court stated that a defendant acts "knowingly" under RCRA, even if the defendant only willfully fails to determine the permit status of a facility where hazardous

(upholding the conviction of a bank over violations of the Currency Transaction Reporting Act based on a "pattern of illegal activity," which established an illicit "scheme.").

[217] *See id.*

[218] *See* United States v. Marathon Dev. Corp., 867 F.2d 96, 97 (1st Cir. 1989) (holding corporate defendant criminally liable for actions of its senior vice-president, who had caused a protected federal wetlands to be dredged and filled without a permit); *see also* Joseph G. Block & Nancy A. Voisin, *The Responsible Corporate Officer Doctrine—Can You Go to Jail for What You Don't Know?,* 22 ENVTL. L. 1347, 1366-67 (1992) (arguing that substitutional doctrines, such as willful blindness and respondeat superior, create the danger that the requisite knowledge requirement will be read out of the environmental statutes).

[219] *See* N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 494 (1909) ("Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him . . . may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises."); *see also* United States v. Nearing, 252 F. 223, 231 (S.D. N.Y. 1918) (Learned Hand, J.) ("[T]there is no distinction in essence between the civil and the criminal liability of corporations, based upon the element of intent or wrongful purpose. Each is merely an imputation to the corporation of the mental condition of its agents.").

[220] Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1573 (1990).

[221] Stefan A. Noe, *"Willful Blindness": A Better Doctrine for Holding Corporate Officers Criminally Responsible for RCRA Violations*, 42 DEPAUL L. REV. 1461, 1469 (1993).

[222] *Id.* (quoting United States v. Jewell, 532 F.2d 697, 700 (9th Cir. 1976).

[223] *Id.* (quoting United States v. Jewell, 532 F.2d 697, 700 (9th Cir. 1976).

[224] United States v. Hayes Int'l Corp., 786 F.2d 1499 (11th Cir. 1986).

waste is being shipped.[225]

iii. An Affirmative Duty To Act

In some situations, the courts have permitted criminal knowledge to be established based on what the defendant would have known through the exercise of reasonable diligence. Generally, this is applied if the defendant has some affirmative duty to know the facts or to investigate the situation.[226] This theory could be used to support imposing liability under the RCO doctrine based on the affirmative duty that an officer owes to his or her company.

A corporate officer has a fiduciary duty to the company that includes the duty of care and the duty of loyalty.[227] The duty of care can be used to impose liability because it establishes standards by which an officer is expected to act.[228] The duty of care requires officers to maintain adequate oversight of corporate operations and to obtain adequate and reliable information before making decisions.[229] This duty requires an officer to take an active role in monitoring the corporation's activities.[230] Additionally, the courts have found that officers are under a continuing obligation to keep informed about the activities of the corporation and

[225] *See id.* at 1504 ("[I]n this regulatory context a defendant acts knowingly if he willfully fails to determine the permit status of the facility." (citing *Boyce Motor Lines v. United States,* 342 U.S. 337 (1952)).

[226] *See*, *e.g.,* United States v. Dee, 912 F.2d 741, 745 (4th Cir. 1990) (allowing inference of criminal knowledge based on the defendant's failure to exercise reasonable diligence). The defendants in *Dee* were civilian engineers involved in the development of chemical warfare systems at the Chemical Research, Development, and Engineering Center at Aberdeen Proving Ground in Maryland. *Id.* at 743. They were convicted of illegally storing, treating, and disposing of hazardous wastes and appealed the convictions on several grounds. *Id*. The court found that knowledge could be inferred with respect to one of the defendants from evidence that he was informed by safety inspectors and employees of problems with the stored chemicals. *Id.* at 745. The defendant did not respond but merely told the staff to "clean it up as best they could." *Id.* The court also found that knowledge could be inferred from evidence that the defendant was in charge of operations at the plant, had previously taken action with respect to the storage of the chemicals, repeatedly ignored warnings, and took no actions to comply with the RCRA. *Id.*

[227] *See* REV. MODEL BUS. CORP. ACT § 8.30 official cmt. (1983).

[228] *See id.* (setting forth the standards of conduct for officers by focusing on the manner in which officers perform their duties); *see also* Lyman P.Q. Johnson, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597 (2005) (discussing fiduciary duties of corporate officers).

[229] *See* Francis v. United Jersey Bank, 432 A.2d 814, 822-24 (N.J. 1981) (stating that a corporate officer should acquire at least a basic understanding of business of corporation and accordingly and that officers are bound to exercise ordinary care so they cannot set up as a defense lack of knowledge needed to exercise the requisite degree of care).

[230] *See id.* (listing several steps that a reasonably prudent officer should take in order to maintain proper oversight over a corporation's affairs).

are bound to exercise ordinary care.[231]

As discussed above, a corporate officer is subject to criminal liability if he or she actively participated in or directed illegal conduct.[232] It can be argued that an officer who violates his or her duty of oversight by allowing the corporation to break the law should also be held liable, even if the officer was not the person who actually participated.[233] In the corporate structure, as discussed above, the corporate officer has a duty of oversight.[234] Logically, the omission or failure to comply with this duty of oversight could lead to criminal liability as well.

VIII. CONCLUSION

Protection of the environment is essential to our continued existence. Based on modern corporations' size and ability to impact the environment, it is in the corporate context that the prosecution of environmental crimes is so important. The courts should expand criminal liability based on the RCO doctrine instead of limiting its application. Prevention is the key to the effectiveness of environmental laws, and this would best be met by the application of the RCO doctrine to expand criminal liability. As the need for environmental awareness becomes greater every day, we have to pay attention to the impact we are having on the environment. As time passes we are slowly losing our opportunity to prevent further deterioration. This is why it is essential to extend criminal sanctions to corporate officers, the actual actors, instead of stopping at the front door of the corporation.

Nancy Mullikin*

[231] *See id.* ("Directorial management does not require a detailed inspection of day-to-day activities, but rather a general monitoring of corporate affairs and policies. Accordingly, a director is well advised to attend board meetings regularly.").

[232] *See* 19 C.J.S. Corporations § 649 (June 2009). ("A corporate official or agent is personally liable for all criminal acts in which he or she participates, regardless of whether he or she is acting on his or her own behalf or on behalf of the corporation.").

[233] *See* Note, *Fiduciary Duties: Expanding the Use of the RCO Doctrine to Statutes with a Scienter Requirement*, 9 U. MIAMI BUS. L. REV. 235, 248 (2001) (arguing that extending strict liability to corporate directors and officers in the area of environmental statutes is appropriate based on directors' and officers' duty to the corporation).

[234] *See* United Jersey Bank, 432 A.2d at 822 (discussing duties of a director, including "general monitoring of corporate affairs and policies," regular attendance at board meetings, and "familiarity with corporation's financial status").

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